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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

GARY MEZZANATTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide that statements made in the course of plea discussions with an attorney for the government that do not result in a plea of guilty normally may not be admitted against the defendant who made the statements. The question presented in this case is whether the government may use such statements to impeach the defendant's contrary testimony at trial, when the defendant and his counsel expressly agreed before those statements were made that the government would have the right to use the statements in that manner.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 998 F.2d 1452.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1993. The court of appeals denied a timely petition for rehearing on November 9, 1993. App., *infra*, 20a. On January 28, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rules 102 and 410, Fed. R. Evid.; and Rules 2 and 11(e)(6), Fed. R. Crim. P., are reproduced in the appendix to the petition.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted of possessing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 170 months' imprisonment, to be followed by 60 months' supervised release. The court of appeals reversed. App., *infra*, 1a-19a.

1. On the morning of August 1, 1991, San Diego Narcotics Task Force (SDNTF) agents arrested Gordon Shuster during the execution of a search warrant at a Rainbow, California, residence where Shuster operated a clandestine laboratory for manufacturing methamphetamine. Shuster agreed to cooperate with the SDNTF agents in apprehending others involved in the methamphetamine trade. Tr. 101-106, 152-156.

That afternoon, Shuster placed a call to respondent's pager. When respondent returned Shuster's call, Shuster said that one of his friends (in reality, an undercover officer) wished to purchase a pound of methamphetamine for $13,000, and that the friend would "front" additional money toward the purchase of a second pound of methamphetamine to be delivered later. Shuster made arrangements to meet respondent later that day, and the two met at a local restaurant that evening. Tr. 108-109, 113-114, 121-129.

In the course of the meeting, Shuster introduced the undercover officer to respondent. The officer

asked respondent if "he had brought the stuff with him," to which respondent replied that it was in his car. Respondent and the officer then went to the car, where respondent pointed to a brown paper package. The officer inspected the package, which contained approximately one pound of methamphetamine, and asked how long it would take to produce the second pound. Respondent replied that it would take about six hours. Respondent then took out a glass pipe (later found to contain methamphetamine residue), pointed to the package, and asked the officer if he wanted to take a "hit"—*i.e.*, smoke some of the methamphetamine. The officer replied that he would first get the money. The officer then left the car and gave a pre-arranged arrest signal. Respondent was arrested. Tr. 130-138, 228-229.

2. On October 17, 1991, respondent and his attorney requested a meeting with the Assistant United States Attorney (AUSA) prosecuting the case to discuss respondent's participation in the offense, with a view to offering his cooperation to the government. The AUSA agreed to meet with respondent and his attorney, and the meeting took place on the same day. Two SDNTF agents who were familiar with the investigation were also present. Tr. 359, 365-367.

The AUSA began the meeting by emphasizing that respondent was under no obligation to talk, but that if respondent wanted to cooperate with the authorities he would have to be completely truthful. The AUSA advised respondent that statements he made during that proffer session would not be used as evidence in the government's case-in-chief if respondent proceeded to trial, but that the government's willingness to entertain respondent's proffer was conditioned on

his agreement to allow the government to use his statements in other ways. The government would be permitted to use those statements in a subsequent perjury or false statements prosecution, and to impeach respondent's testimony if he went to trial and gave testimony that differed from the statements he made at the meeting. After the AUSA gave respondent an opportunity to discuss the government's terms with his attorney, respondent and his attorney agreed to them. Tr. 323-324, 358, 366-367, 369-370.

Respondent then stated that he had dealt only in ounce quantities of methamphetamine prior to his arrest, but that he knew that the package he attempted to sell to the undercover officer contained methamphetamine. Respondent initially claimed that he was merely acting as a broker for Shuster, and that he had not known that Shuster was manufacturing methamphetamine on the Rainbow property. Later in the meeting, however, he admitted that he had known that Shuster was engaged in the manufacture of methamphetamine, and that he had helped Shuster move glassware used in that process. Respondent then sought to minimize his involvement in the operation by claiming that he had not visited the Rainbow property for at least a week before his arrest. The SDNTF agents confronted respondent with surveillance evidence that showed that his car was on that property the day before the arrest—and that respondent's claim was a lie. Citing respondent's failure to provide completely truthful information, the AUSA terminated the meeting. Tr. 181, 367-369.

3. Respondent took the stand in his defense at trial. He gave an elaborate account of his relationship

with Shuster, in which he claimed that he had helped Shuster with various projects in the belief that Shuster worked for the Central Intelligence Agency (CIA). Respondent purportedly believed that Shuster was using the Rainbow property to manufacture plastic explosives for the CIA. Respondent also claimed that he obtained a pager at Shuster's request, to allow Shuster to contact him when Shuster had projects for him, and that Shuster had instructed him to list the pager under a fictitious name to prevent anyone from tracing respondent's connection to Shuster. Tr. 265-267, 276-280, 303, 305-307.

Respondent testified that he was not involved in methamphetamine trafficking, and that he did not know that the package he delivered to Shuster contained methamphetamine. Instead, respondent claimed that he received the package from Shuster the day before his arrest, that Shuster expressed concern at that time that the neighbors were becoming "nosey" about his explosive-making activities, and that respondent had accordingly surmised that the package contained plastic explosives. Respondent also testified that Shuster paged him repeatedly on the day of his arrest to arrange for the delivery of the package, and that respondent agreed to deliver it in exchange for $1,300. He explained his conversation with the undercover agent by stating that he was just "playing along" and that it was "Gordon's [Shuster's] deal." Tr. 275-278, 282-288, 312-315, 334-335.

On cross-examination, the prosecutor questioned respondent over objection about his inconsistent statements at the October 17, 1991, meeting and about his failure to advert to Shuster's purported CIA connections at that time. Respondent denied having

stated that he knew the package contained methamphetamine, or that he had trafficked in ounce quantities of methamphetamine. Tr. 290-295, 318-322, 327, 351-352. The government then called one of the agents who was present at the meeting. The agent recounted respondent's prior inconsistent statements. Tr. 365-371. The jury found respondent guilty.

4. A divided panel of the court of appeals reversed. The court began by noting that Rule 410, Fed. R. Evid., and Rule 11(e)(6), Fed. R. Crim. P., are both "quite clear" that a statement made in the course of plea discussions with the attorney for the government is "not * * * admissible against the defendant" except (i) when another statement made in the same discussions has been introduced and the statement in fairness should be considered with it, and (ii) in certain prosecutions for perjury or false statement. Citing *United States* v. *Lawson*, 683 F.2d 688 (2d Cir. 1982), the court concluded that the language rendering such plea discussions "not admissible," read in light of its legislative history, bars the use of such statements to impeach the defendant. Because neither of the exceptions to the rules applied, the court held that the rules barred the admission of the statements made by respondent during the October 17, 1991, proffer session. App., *infra*, 4a-5a.

The court next concluded that a defendant may not waive the protections of Rules 410 and 11(e)(6), even when he agrees to do so with the advice of counsel. In the court's view, "candid and effective plea bargaining could be severely injured" if the rules were subject to waiver, because such waivers "could easily have a chilling effect on the entire plea bargaining process."

App., *infra*, 7a. The court rejected the government's submission that a defendant may waive his rights under the rules just as he may waive constitutional rights, explaining that judicially created waivers of constitutional rights are "an inescapable feature of courts interpreting the Constitution by defining the right being asserted." *Id.* at 9a. By contrast, "[t]o write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress * * * is not an inescapable duty. It more resembles unwelcome advice." *Ibid.* Finally, the court stated that "the government should not be given the ability to extract a waiver of [the] rules from a defendant who is in a weak bargaining position," because "[w]ith such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy." *Ibid.*

Chief Judge Wallace dissented. He noted that criminal defendants may waive the most fundamental rights afforded them by the Constitution, and that it is therefore anomalous to create "a per se rule which invalidates any and all waivers of the protections afforded * * * by" Rules 410 and 11(e)(6). App., *infra*, 12a. Judge Wallace also disagreed with the majority's contention that permitting the government to obtain a waiver would undermine the policy underlying the Rules. He noted that the only "rights" a defendant waives are the "right" to lie in plea negotiations and the "right" to engage in plea bargaining, neither of which is truly a "right." App., *infra*, 14a-15a.

Judge Wallace also found speculative the majority's concern that waivers may reduce plea bargaining, and he rejected the majority's assumption that its rule against waiver was needed to avoid abuses by the

government. He noted that in *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), this Court emphasized its unwillingness to assume that prosecutors will engage in wrongdoing, and the Court upheld an agreement in which an arrestee waived his right to pursue a civil rights action in exchange for dismissal of all criminal charges against him. He explained that, unlike the defendant in *Town of Newton*, who "gave up a potentially legitimate civil rights suit," respondent merely "gave up his ability to provide inconsistent testimony." App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

The court of appeals concluded that a defendant and his attorney may not agree with the government to waive the rules that make evidence obtained during plea discussions inadmissible, so that the defendant's statements can be used to challenge his inconsistent trial testimony. That conclusion conflicts with a recent decision of the Seventh Circuit, and it calls into question procedures routinely used by federal prosecutors throughout the country. Because this case presents an issue of substantial importance to the federal criminal justice system, it calls for review by this Court.

1. The decision of the court of appeals conflicts with *United States* v. *Dortch*, 5 F.3d 1056 (7th Cir. 1993), petition for cert. pending *sub nom. Suess* v. *United States*, No. 93-7218 (filed Dec. 20, 1993). Suess, one of the defendants in that case, entered into a pretrial agreement with the government in connection with his proffer of cooperation. Like respondent, Suess agreed to let the government use his statements to rebut any contrary evidence that he might

introduce at trial. After Suess called a witness who contradicted the statements he had made during the proffer, the government exercised that right without objection. 5 F.3d at 1067. "Leaving aside the issue of whether Suess adequately preserved his objection at trial," the Seventh Circuit concluded that Suess's waiver barred his claims under Rules 410 and 11(e)(6). 5 F.3d at 1067-1068.

Like the court of appeals in this case, the Seventh Circuit concluded that the statements would not be admissible under the rules absent a waiver. 5 F.3d at 1068. But the Seventh Circuit took a different view of the policy implications of such a waiver. The court noted that there is nothing inherently suspect about a waiver of the rights conferred by Rules 410 and 11(e)(6), since even constitutional rights can be waived. Moreover, the court concluded that a waiver does not jeopardize plea negotiations, because the defendant knows where he stands at all times: in advance of his proffer to the government, he knows that if he later makes inconsistent statements at trial, his earlier statements can be used against him. That fact simply informs the defendant's conduct in planning his strategy at the proffer session and at trial. 5 F.3d at 1068. The government's insistence on such a waiver as a condition of entering into plea negotiations does not put defendants in an untenable position, the court explained, because it harms the defendant only if the defendant "elicits or produces inconsistent testimony at a later date." 5 F.3d at 1069. Holding a defendant to the terms of the proffer, the court noted, "fosters another laudable policy—encouraging defendants to tell the truth during both plea negotiations and subsequent trials." *Ibid.* The

Seventh Circuit accordingly upheld the validity of the waiver.

The Seventh Circuit's decision accords with decisions in other circuits, which have either enforced or assumed the validity of similar waiver agreements. See, *e.g.*, *United States* v. *Perrone*, 936 F.2d 1403, 1412 ("Given Perrone's inconsistent testimony and his earlier agreement that statements from plea discussions could be used to rebut such testimony, there is no merit to [his] argument that allowing such rebuttal was improper."), clarified on other grounds on reh'g, 949 F.2d 36 (2d Cir. 1991); *United States* v. *Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (noting that "[p]lea agreements * * * commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is inadmissible as substantive evidence of guilt, but is admissible for purposes of impeachment," and that a defendant who signs such an agreement "waives the protection of Fed. R. Crim. P. 11(e)(6) for the purposes of impeachment"). But cf. *United States* v. *Acosta-Ballardo*, 8 F.3d 1532 (10th Cir. 1993) (suggesting agreement with the decision below).

2. The court of appeals' decision invalidates, in the Ninth Circuit at least, an important and widespread practice employed as a part of plea bargaining and cooperation arrangements. Waiver agreements like the one invalidated by the court of appeals are routinely used in many districts and are often an important element in the government's willingness to participate in plea discussions with defendants who proffer their cooperation. Such agreements are used not only by United States Attorneys' Offices throughout the country (including nearly all the

offices in the Ninth Circuit), but also by the Criminal Division of the Department of Justice.

The court of appeals' ruling significantly hinders the government's ability to obtain reliable information from cooperating witnesses. A prosecutor often will be unable to judge the value of a defendant's information to other investigations, or the usefulness of his testimony in other trials, without extensively questioning him—*i.e.*, securing his statements as part of "plea discussions" under Rules 410 and 11(e)(6). But the prosecutor may be unwilling to use the facts proffered by the defendant as the basis for charging or convicting other persons when the defendant wishes to retain the ability to change his story under oath when his own liberty is at stake.[1] It is reasonable for a prosecutor to conclude that a defendant who is willing to cooperate in the prosecution of others only on those terms has little of value to offer to the government. By effectively freeing suspects and criminal defendants to take casually the truth of the statements they make to the prosecutor, the court of appeals has deprived the government of an important check on the reliability of statements made by cooperating witnesses.

[1] If the government lacks effective means of policing the truthfulness of the information proffered by the defendant—such as the means supplied by the agreement condemned by the court below—the defendant's testimony will be subject to ready impeachment when the government attempts to use it in the prosecution of others. To the extent the defendant's testimony is nonetheless credited by a jury, the absence of such a necessary check on its veracity may increase the number of instances in which the prosecutor unwittingly presents, and a jury consequently relies on, false testimony—thereby seriously disserving important constitutional values.

The court of appeals' analysis also reflects little consideration of the incentives that its ruling creates for criminal defendants. Under the court's rule, a defendant will be free to use his proffer of cooperation as an opportunity to "try out" a story on the prosecutor. That tactic will permit the defendant to gain the best of all worlds: favorable treatment if the prosecutor is persuaded, and an opportunity to swear to a different version of the events at his trial—without fear of contradiction and aided by any facts he learns during the proffer session—if the prosecutor is not persuaded.[2] The court of appeals' refusal to recognize a waiver of Rules 410 and 11(e)(6) therefore allows defendants to pervert those rules "into a license to use perjury by way of a defense," *Harris* v. *New York*, 401 U.S. 222, 226 (1971), and "to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.7 (1976). That result is flatly contrary to the basic guide to the interpretation of those rules—*i.e.*, that the rules "shall be construed to secure fairness in administration * * * to the end that the truth may be ascertained

[2] That is exactly what respondent attempted to do in this case. After failing to persuade the AUSA, respondent not only testified to a completely different version of his involvement in methamphetamine trafficking, but he also took care to admit that he had been present on Shuster's property on the day before his arrest—and thereby attempted to neutralize the surveillance evidence about which he learned during his meeting with the prosecutor and the agents. Indeed, defense counsel argued in summation that the jury should believe respondent's story because that story was confirmed by the government's surveillance evidence. Tr. 420.

and proceedings justly determined." Fed. R. Evid. 102; see also Fed. R. Crim. P. 2.

The court of appeals justified its broad rule of nonwaivability in part on the ground that courts must protect "a defendant who is in a weak bargaining position" in order to prevent governmental abuse. App., *infra*, 9a. This Court, however, has always proceeded on the assumption that "the mutuality of advantage" inherent in plea bargaining means that "'the prosecution and defense * * * arguably possess relatively equal bargaining power.'" *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362, 363 (1978) (quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)). See also *United States* v. *Goodwin*, 457 U.S. 368, 377-378 (1982). For that reason, the best protection against the possibility of abuse is the adversarial process of bargaining itself. A defendant who has the assistance of competent counsel, as respondent did, can decide not to waive his rights under Rules 410 and 11(e)(6) in the first place, and if the prosecutor refuses to engage in plea bargaining absent such a waiver, the defendant can refuse to cooperate with the government and insist on his right to stand trial. And if the plea negotiations break down, the defendant is free to go to trial, burdened only by the knowledge that if he testifies inconsistently with his proffer statement, the prosecutor will be free to impeach him with that prior inconsistent statement. That weapon in the prosecutor's arsenal may make going to trial marginally less attractive to the defendant, but it does not foreclose that option altogether, and it certainly does not make it more likely that the trial will produce an unreliable result. Because the parties are free to negotiate over the

terms of the waiver, it is difficult to see why the availability of a waiver as one of the options for the parties to bargain over is inherently abusive or why it warrants the broad *per se* rule adopted by the court of appeals.

3. Both this case and the conflicting Seventh Circuit decision in *Suess* v. *United States*, No. 93-7218, are before the Court at the same time. We believe that this case presents a better vehicle than *Suess* for resolving whether a defendant may waive the protections of Rules 410 and 11(e)(6), because Suess did not adequately raise the issue of waivability in the district court. While the Seventh Circuit resolved that issue on the merits, Suess's conviction would be subject to reversal by this Court only if the admission of the evidence was "plain error." A decision by this Court limited to the question of plain error would not necessarily resolve cases in which a defendant timely raises the question presented here. For that reason, we suggest that the better course would be to grant this petition and to hold the petition in *Suess* pending the resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY MEZZANATTO, DEFENDANT-APPELLANT

No. 92-50261
D.C. No. 91-739-01-EBG

Appeal From the United States District Court
for the Southern District of California
Earl B. Gilliam, District Judge, Presiding

Argued and Submitted
February 2, 1993—Pasadena, California

Filed July 7, 1993

Before: J. Clifford Wallace, Chief Judge, Joseph T. Sneed and Cynthia Holcomb Hall, Circuit Judges

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Opinion by Judge Sneed; Dissent By
Chief Judge Wallace

SNEED, Circuit Judge:

Appellant challenges the district court's ruling allowing the prosecution to introduce statements he made during failed plea negotiations for impeachment purposes. We reverse the appellant's conviction and remand for a new trial.

I.

FACTS AND PRIOR PROCEEDINGS

Appellant Gary Mezzanatto was charged with possession of methamphetamine in violation of 21 U.S.C. § 841(a)(1). At Mezzanatto's request, the government held a plea bargaining meeting with him. Before the start of this meeting, the prosecutor informed Mezzanatto that any statements he made during the meeting could be used to impeach any inconsistent testimony he offered at trial, if the case proceeded that far. Mezzanatto agreed to this, and the meeting began. The parties did not reach an agreement.

At trial, Mezzanatto offered testimony that was inconsistent with statements he made during the negotiations. The government introduced the prior statements to impeach Mezzanatto. The appellant objected, but the court overruled the objections and allowed the statements for impeachment.

The jury found Mezzanatto guilty, and the district court imposed a 170 month prison term to be followed by five years of supervised release.

II.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. Whether plea negotiation statements may be introduced to impeach a defendant and whether a defendant may waive the prohibition against the introduction of plea negotiations statements are questions of law and of statutory interpretation, and therefore, we review these issues de novo. See *Anderson v. United States*, 966 F.2d 487, 489 (9th Cir. 1992).

III.

DISCUSSION

A. *Issues on Appeal.*

This appeal involves Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6). Rule 11(e)(6) is nearly identical in form and is identical in substance to Rule 410. Rule 410 reads:

> **Inadmissibility of Pleas, Plea Discussions, and Related Statements**
>
> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
>
> (4) any statements made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Before reaching the primary issue this case presents, whether a defendant may waive the prohibition against the introduction of statements made during plea negotiations, we examine the scope of the two rules.

B. *The Scope of the Rules.*

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) are quite clear that statements made in the course of plea discussions are generally not admissible at trial. In only two instances are plea negotiation statements admissible. The first is an exception to prevent selective admission of plea negotiation statements. If a defendant introduces a statement made during plea negotiations, the prosecution may introduce other relevant plea negotiation statements so that the jury receives a full account of the issue presented. The only other exception allows for the admission of certain plea negotiation statements in a separate proceeding against the defendant for perjury. This exception is designed to permit punishment of defendants who take the stand and testify contrary to their plea negotiation statements. These two exceptions to an otherwise absolute rule do not include the use of such statements for impeachment.

The legislative history of these Rules is quite clear that plea negotiation statements are not admissible to impeach a defendant. A version of Rule 410, which never became effective, did allow plea negotiation statements to be introduced for impeachment, but this language was ultimately rejected. S. Rep. No. 1277, 93d Cong., 2d Sess. 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057; H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 10 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713; *see also* Fed. R. Evid. 410 (1974); Pub. L. 94-149, 89 Stat. 805 (1975). Congress unmistakably did not want statements made during plea negotiations to be used to impeach defendants. Detailing this history concerning impeachment, the Second Circuit said, "We regard this legislative history as demonstrating Congress' explicit intention to preclude use of statements made in plea negotiations for impeachment purposes." *United States v. Lawson*, 683 F.2d 688, 692-93 (2d Cir. 1982); *accord United States v. Martinez*, 536 F.2d 1107, 1108 (5th Cir. 1976).

Commentators offer no disagreement. *See, e.g.*, Charles A. Wright & Kenneth W. Graham, Jr., 23 Federal Practice and Procedure § 5349 (1980); David W. Louisell & Christopher B. Mueller, 2 Federal Evidence § 188 (1985). No one argues that Congress did not mean what it said.

This brings us to the issue to which Congress did not speak. Can the defendant waive the protection of these rules?

C. *The Protection Against the Admission of Statements Made During Plea Negotiations Cannot Be Waived.*

The issue of waiver of the protection of Rules 410 and 11(e)(6) is one of first impression.[1] The government contends that this rule may be waived by a defendant, and it argues that Mezzanatto knowingly and intelligently waived this protection. Mezzanatto insists that the prohibition in Rules 410 and 11(e)(6) may not be waived. We agree with the appellant.

The importance of the prohibition against the admission of plea negotiation statements is best understood in the broader context of the criminal

[1] This issue was before the District of Columbia Circuit, but it resolved the case on other grounds. *United States* v. *Wood*, 879 F.2d 927, 937 (D.C. Cir. 1989).

justice system. Plea bargains are an important and useful part of our criminal justice system.[2] They allow criminal cases to be resolved in a quick and cost effective manner while maintaining the just administration necessary to the criminal justice system. Rules 410 and 11(e)(6) were designed to promote plea agreements by encouraging frank discussion in negotiations because such unrestrained candor promotes effective plea bargaining. See Fed. R. Crim. P. 11 adv. comm. note (1979), *reprinted in* 18 U.S.C. App. (1988).

For instance, prosecutors of those engaged in criminal conspiracies desire the fullest cooperation of those accused of participation therein. Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted. Rules 11(e)(6) and 410(4) aid in obtaining this cooperation. A lesser member of the conspiracy will more freely provide useful information to the prosecutors if he knows that none of his statements in plea bargaining sessions can be used against him.

Moreover, full cooperation may enhance the prospects of a better plea bargain from the prosecutor. In a sense, most defendants who enter plea bargaining do so with the prospect of exchanging information about other offenses or defendants for a lesser punishment for themselves. The rules at issue here permit the plea bargainer to maximize what he has "to sell" with the ability to withdraw from the

[2] See *Blackledge* v. *Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 1627, 62 L.Ed.2d 136 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."); *Santobello* v. *New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.E.2d 427 (1971) ("Disposition of charges after plea ~~discussions is~~ not only an essential part of the process but a highly desirable part for many reasons.").

bargain proposed by the prosecutor without being harmed by any of his statements made in the course of an aborted plea bargaining session.

To allow waiver of these rules would be contrary to all that Congress intended to achieve. If these rules were subject to waiver, candid and effective plea bargaining could be severely injured. As the Eighth Circuit aptly explained, "[m]eaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976). Waiver of the protections of Rules 410 and 11(e)(6) could easily have a chilling effect on the entire plea bargaining process. See Wayne R. LaFave & Jerold H. Israel, 2 Criminal Procedure § 20.2, at 611 (1984).

The government, not unreasonably, argues that since defendants can waive other statutory and constitutional rights, they should be able to waive Rules 410 and 11(e)(6).[3] They rely on *Newton v. Rumery*,

[3] It is unclear whether the prohibition against the admission of plea negotiation statements in Rules 410 and 11(e)(6) should be considered an administrative rule or a personal right. But even if the prohibition is labeled a personal right, it is still not waivable. As the Supreme Court said nearly half a century ago, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. . . . Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 900, 89 L.Ed. 1296 (1945) (footnote and citations omitted). Allowing a waiver of these rules would contravene and thwart the policy—efficient case resolution through plea bargaining—these rules were designed to effectuate.

480 U.S. 386, 107 S. Ct. 1187, 94 L.Ed2d 405 (1987), and *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1488 117 L.Ed2d 629 (1992), to support this argument. Neither these cases nor the analogy support the existence of a waiver power for these Rules.

In *Newton*, Mr. Rumery relinquished his personal right to pursue a civil remedy against the town of Newton, New Hampshire, which had arrested him, in exchange for a dismissal of all criminal charges against him. 480 U.S. at 390, 107 S. Ct. at 1190. The issue before the Court was whether such a "release-dismissal" agreement should be considered unenforceable as against public policy. *Id.* at 389, 107 S. Ct. at 1190. Although the Court agreed that such agreements may infringe on important interests of criminal defendants and society, *id.* at 392, 107 S. Ct. at 1191, the Court held that the agreement was enforceable because the "agreement would not adversely affect the relevant public interests." *Id.* at 398, 107 S. Ct. at 1195 (footnote omitted).

That conclusion is inapplicable to the situation here. To allow the government to enforce its waiver agreement would, as already pointed out, adversely affect the public interest in efficient criminal case resolution. Furthermore, *Newton* dealt with the waiver of a civil remedy and a dismissal of criminal charges. Unlike the present situation, the range of possible adverse consequences to society in *Newton* is quite small.

Navarro-Botello does not help the government, either. The government argues that since defendants can waive the right to appeal, as in *Navarro-Botello*, 912 F.2d at 319-20, or certain other constitutional rights, a defendant should be able to waive the right to exclude plea negotiation statements. It is indisputable that defendants can waive certain rights during plea negotiations. But to allow waiver of Rules 410 and 11(e)(6), which are part of the plea bargaining mechanism, could damage the system approved by Congress and the Supreme Court. They do not guarantee substantive rights so much as they guarantee fair procedure.

To equate the waiver of these rules with that of an asserted constitutional protection is a false equality. Judicially created waivers of the latter are the result of an inescapable feature of courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. Given the precision with which these rules are generally phrased, the comparative recentness of their promulgation, and the relative ease with which they are amended, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule.

Furthermore, the government should not be given the ability to extract a waiver of these rules from a defendant who is in a weak bargaining position. It should be noted that the government extracted the attempted waiver from Mezzanatto, not as part of a plea bargain, but simply as the price for the opportunity to enter into discussions that could have, but did not, lead to a plea bargain. With such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy.

We therefore hold that the prohibition against the admissibility of statements made during plea negotiations is not subject to waiver.[4]

D. *The Error Was Not Harmless.*

Federal Rule of Criminal Procedure 11(h) requires a harmless error standard to be used for violations of plea bargaining rules. The same standard is applied for violations of Rule 410. *See Lawson*, 683 F.2d at 693. The contradictory impeachment evidence was clearly a significant blow to the appellant's defense. It easily could have altered the balance in the eyes of the jury. Therefore, we find the error was not harmless and set aside the conviction and reverse the judgment and remand to the district court.

We find no merit in the remainder of the appellant's contentions, but we direct the district court's attention to the Supreme Court's teachings in *United States v. Dunnigan*, ___ U.S. ___, 113 S. Ct. 1111, 122 L.Ed2d 445 (1993), should resentencing be required.

REVERSED and REMANDED.

WALLACE, Chief Judge, dissenting:

A criminal defendant may waive the most fundamental rights and protections afforded him or her by the Constitution or a statute. *Peretz v. United States*, ___ U.S. ___, ___, 111 S. Ct. 2661, 2669, 115 L.Ed2d 808 (1991); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (*Navarro-Botello*),

[4] We are not holding that the introduction of plea negotiation statements is per se reversible error. If a defendant fails to object at trial to the introduction of such testimony, he has implicitly waived the protection. Furthermore, as is explained in the following part, any error is subject to a harmless error analysis.

cert. denied, ____ U.S. ___, 112 S. Ct. 1488, 117 L.Ed2d 629 (1992). A defendant, for example, may knowingly and voluntarily waive the Fourth Amendment right to be free from warrantless searches, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2058, 36 L.E.2d 854 (1973); the Fifth Amendment privilege against self-incrimination, *see Navarro-Botello*, 912 F.2d at 321; the Sixth Amendment rights to counsel, *see Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2540, 45 L.Ed2d 562 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 1023, 82 L.E.2d 1461 (1938), to a jury trial, and to confront and cross-examine witnesses, *see Navarro-Botello*, 912 F.2d at 321; and the statutory rights to appeal, *see id.*, and to pursue valid civil rights claims against government officials, *see Town of Newton v. Rumery*, 480 U.S. 386, 392-98, 107 S. Ct. 1187, 1191-95, 94 L.Ed.2d 405 (1987) (*Newton*).

A defendant, by failing to object at trial, also may implicitly waive his or her Fourth Amendment right against unlawful search and seizure, *see Segurole v. United States*, 275 U.S. 106, 110-11, 48 S. Ct. 77, 79, 72 L.Ed.2d 186 (1927); Fifth Amendment privilege against self-incrimination, *see United States v. Coleman*, 707 F.2d 374, 376 (9th Cir.), *cert. denied*, 465 U.S. 854, 104 S. Ct. 171, 78 L.Ed.2d 154 (1983), and against being placed in double jeopardy, *see United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S. Ct. 3476, 3477, 87 L.Ed.2d 613 (1985); and Sixth Amendment rights to be present at all stages of trial, *see United States v. Gagnon*, 470 U.S. 522, 528, 105 S. Ct. 1482, 1485, 84 L.Ed.2d 486 (1985), and to a public trial, *see Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L.Ed.2d 989 (1960). As the Supreme Court summarized, "No procedural principle is more familiar to

this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L.E.2d 834 (1944).

Against this backdrop, the majority creates, without the assistance of precedent, a per se rule which invalidates any and all waivers of the protection afforded not by such basic and fundamental rights, but by Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) (collectively Rules). The majority brushes aside the question whether the waiver is knowing and voluntary; the newly crafted majority directive is absolute. The bases of this ruling are that to allow waiver would subvert the policies advanced by the Rules, that writing in a waiver would amount to "unwelcome advice," maj. op. at 7049, and that the availability of waivers would tempt governmental abuse. Because none of these bases supports the majority's position, and because there is no principled way to set these particular Rules apart from the vast majority of rules and rights that are subject to waiver, I dissent.

I

As for the first basis, that allowing waivers would subvert the policies advanced by the Rules, I have several objections. I start with what is not said: the majority has not identified what is so unique about the Rules that warrants a solicitude extended to very few rights or rules. At one point the majority states, without more, that the Rules should not be waived because they guarantee "fair procedure" rather than substantive rights. Maj. op. at 7049. Yet earlier in the opinion, the majority deems this distinction

irrelevant, and goes on to suggest that "personal right[s]" should be *less* subject to waiver than administrative procedural rules. *Id.* at 7048 n. 3. This apparent contradiction is symptomatic of the majority's futile search for a sound distinction between the Rules and all those rules subject to waiver.

A distinction does not appear warranted based on policy, for surely the policies behind the Rules are no more important than the policies advanced by those rights and rules that may be waived. It would be difficult to conclude, for example, that the policy of quickly and cheaply resolving cases is more important than the policy of securing ourselves in our "persons, houses, papers, and effects." U.S. Const. amend. IV. Yet the criminal defendant who is subject to an unreasonable search and seizure may knowingly waive his Fourth Amendment rights as part of a plea bargain, or he may implicitly waive those rights by failing to object to the introduction of the resulting evidence. If a criminal defendant may waive such a fundamental constitutional right, I fail to see why the policies behind the Rules should preclude a criminal defendant, like Mezzanatto, from knowingly and voluntarily waiving the protection afforded by the Rules.

Nor does it appear that the effect of allowing waivers would be any greater in this context than it is in others. In fact, that effect may be diminished by the exception to the Rules that allows statements made during plea bargaining to be used in later criminal proceedings for perjury. *See* Fed. R. Evid. 410(ii); Fed. R. Crim. P. 11(e)(6)(ii). Allowing a defendant to waive the bar against using his or her plea-related statements for impeachment purposes, therefore, merely enhances a deterrent which already exists within the Rules. Thus, if the policies rep-

resented by the Rules are no more important, and the subversive potential of waivers no greater in this context, there is little ground for distinguishing the Rules from the plethora of rules and rights subject to waivers.

The majority nonetheless contends that to allow waivers would be an injury not only to the defendants affected, but to the administration of the criminal justice system as a whole. Maj. op. at 7046-48. Although I recognize the possibility for harm to defendants and the criminal justice system that allowing waivers might create, I do not think this possibility justifies a per se rule against waivers. *See Newton*, 480 U.S. at 392, 107 S. Ct. at 1191 (holding mere possibility of harm to societal interests insufficient to create a per se rule against release-dismissal agreements). On the contrary, I believe that the majority, by implicitly vaulting plea agreements to the apex of goals sought to be achieved within the criminal justice system, has exaggerated greatly the potential harm represented by waivers.

I begin with the potential injuries to defendants. The defendant who waives his right to give inconsistent testimony at trial should the plea bargain prove fruitless seems to forfeit one "right" directly: the "right" to lie. By forfeiting his ability to provide inconsistent testimony at trial, the defendant has forsaken—or at least diminished—his "right" to lie at some stage of the prosecution. The defendant who forsakes this "right," of course, has sacrificed nothing, as no defendant has the "right" to provide false testimony. *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S. Ct. 988, 997, 89 L.Ed.2d 123 (1986).

Another potential injury to future defendants—though not the defendant in *this* case—identified by the majority is that they may be compelled to forsake

their "right" to plea bargain, if they find that the price of waiver is too high to pay. Such hypothetical defendants also sacrifice a "right" which they never possessed. See *United States v. Wheat*, 813 F.2d 1399, 1405 (9th Cir. 1987) (holding that "there is no right to a plea bargain"), *aff'd*, 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988). In return for this sacrifice, these defendants must stand trial. Where is the harm to a defendant who is "coerced" into going to trial? The most consistent criticism waged against plea bargaining is that defendants are often coerced into pleading guilty to crimes they did not commit. *See generally Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31, 93 S. Ct. 1977, 1984-85, 36 L.Ed.2d 714 (1973) (discussing coercive potential of several common plea-bargaining tactics). The majority has turned this criticism on its head, by suggesting that the problem with waivers is that they will coerce defendants to forgo plea bargaining.

As for the majority's contention that waivers will have a chilling effect on plea bargaining, I see three flaws. First, this prediction is completely speculative. The only evidence we have of the effects of allowing waiver is one case, this one, and the evidence here contradicts the majority's speculation. It does not necessarily follow that defendants will not enter into plea bargains if they first must waive the protection that their statements cannot be used to impeach them at trial.

Second, even assuming the majority's speculation is accurate, I would expect the system to correct itself. The majority recognizes that plea agreements are beneficial not only to criminal defendants. *See* maj. op. at 7047-49. Such agreements, as the majority asserts, are of great importance to the efficient administration of the criminal justice system; they

are of value to the government. *Id.* Given the mutual benefits achieved through plea bargaining, should we expect the government continually to require waivers if such requirements significantly reduce the number of plea agreements reached?

Third, if the number of plea agreements actually does decrease, and more criminal defendants proceed to trial, it does not necessarily follow that the criminal justice system will fail. An unexplored presumption in the majority's opinion is that a reduction in the number of plea bargains would somehow undermine our criminal justice system. I am not certain that the success or failure of criminal justice necessarily turns upon the present rate of plea bargaining. To be sure, more trials would add increased burdens to an already overcrowded court system, but I am not prepared to give such weight to the possible advent of more trials as does the majority.

II

The majority's second rationale appears to be that we should not "write in a waiver" because it is not an "inescapable duty," and it would amount to "unwelcome advice." *Id.* at 7049. Our inescapable duty, as I see it, is to apply the law as it is presented to us, whether it be in the form of constitution, statute, or common law. If our application requires that we interpret the law, we can and must interpret it. The notion that we should not interpret a statute if it is "recently" promulgated (although the Rules here are approximately 20 years old), phrased with "precision" (although the Rules here are silent on the only contested issue), and relatively easily amended is a troubling, if not baffling, addition to the canons of statutory construction.

As for the majority's suggestion that we can "escape" interpretation of the Rules by not "writ[ing] in a waiver," *id.*, I strongly disagree. Indeed, the majority's decision shows quite clearly that interpreting the Rules is unavoidable in this case. For what does the majority do but "write in" a prohibition against waiver into Rules which, as the majority recognizes, are silent regarding the issue? *See id.* at 7046 (recognizing that waiver is an "issue to which Congress did not speak"). Deciding not to allow waivers is every bit as interpretive as deciding that waivers should be allowed. The majority has simply inferred the opposite conclusion than I from Congress's silence.

In addition, given the plethora of rules and rights which can be waived and the paucity of those which cannot, the majority's decision that the Rules here are among the select few unsuited for waiver is a significant act of judicial interpretation. As described at the outset of this dissent, the clear weight of judicial precedent is to allow knowing and voluntary waivers of rights and rules, even where those rules are completely silent regarding waivability. In reading Congress's silence as an indication that waivers should be prohibited, the majority has not only interpreted the Rules, but it has done so in a manner which runs counter to that precedent. Characterizing this interpretation as an act of judicial deference, in my view, is both inaccurate and insufficient to justify the majority's conclusion.

III

The majority's third contention for a per se rule is that waivers allow for governmental abuse. Unfortunately for the majority, this rationale was rejected by the Supreme Court in *Newton*. 480 U.S.

at 396-97, 107 S. Ct. at 1193-94. In refusing to fashion a per se rule against release-dismissal agreements, the Court observed that such a rule improperly "assumes that prosecutors will seize the opportunity for wrongdoing." *Id.* at 396, 107 S. Ct. at 1193. The majority here relies on this rejected assumption, despite the lack of any factual basis for doing so. Indeed, in this case it is clear that Mezzanatto knowingly and voluntarily waived the protections offered by the Rules. The answer is clearly stated by the Supreme Court: "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Id.* at 397, 107 S. Ct. at 1194. Given this tradition and experience, it strikes me as unwarranted to fashion a rule based on the assumption that the government will exploit unwitting defendants if given the opportunity.

IV

Finally, a more generalized comparison between *Newton* and this case highlights the shortcomings in the majority's analysis. In *Newton*, the Supreme Court condoned release-dismissal agreements, whereby the government agrees to drop criminal charges against a defendant in exchange for the defendant's agreement not to pursue a civil rights claim against government officials.

The potential result of such an agreement is that the government drops legitimate criminal charges and the defendant drops legitimate civil rights claims. The Court recognized that these agreements may in some cases infringe important societal interests, but concluded that the "mere possibility of harm to these interests" does not justify a per se rule. *Id.* at 392, 107 S. Ct. at 1191.

The same conclusion is applicable to this case. The interests at stake here are certainly no more compelling. Notwithstanding the majority's somewhat startling assertion that "the range of possible adverse consequences to society in *Newton* is quite small," maj. op. at 7049, few would argue that ensuring the success of plea bargaining is more important than sanctioning government officials who commit civil rights violations. In addition, the potential for coercion seems much slighter here, and the potential consequences of any coercion less troubling. The defendant in *Newton* gave up a potentially legitimate civil rights suit; Mezzanatto, by contrast, gave up his ability to provide inconsistent testimony. Because the Supreme Court did not see fit to fashion a per se rule against release-dismissal agreements, I cannot accept the majority's new per se rule in this context.

V

Mezzanatto requested the government to engage in plea discussions. Before those discussions began, he knowingly and voluntarily agreed that the testimony he provided during plea bargaining could be used to impeach him should he provide inconsistent testimony at trial. This is precisely what occurred. I see no reason not to honor Mezzanatto's agreement with the government. Because I would hold that the introduction of Mezzanatto's plea-bargaining statements was permissible, I would not need to reach the question of whether this alleged error was harmless. In addition, Mezzanatto's other challenges to his conviction and sentence are without merit. Thus, I would affirm.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50261
D.C. No. 91-739-01-EBG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY MEZZANATTO, DEFENDANT-APPELLANT

[Filed: November 9, 1993]

BEFORE: WALLACE, CHIEF JUDGE, SNEED AND HALL, CIRCUIT JUDGES

Chief Judge Wallace voted to grant appellee's petition for rehearing and to accept the suggestion for rehearing en banc; Judges Sneed and Hall voted to deny appellee's petition for rehearing; Judge Hall voted to reject the suggestion for rehearing en banc; and Judge Sneed recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

Rule 102, Fed. R. Evid., provides:

Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 410, Fed. R. Evid., provides:

Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if

the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 2, Fed. R. Crim. P., provides:

Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 11(e)(6), Fed. R. Crim. P., provides:

(6) *Inadmissibility of Pleas, Plea Discussions, and Related Statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a

criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.